BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL EDWARD ISABELL	)	
Claimant	)	
	)	
VS.	)	
	)	
CITY OF HORTON	)	
Respondent	)	Docket Nos. **1,042,109 &**
	)	**1,047,248**
AND	)	
	)	
KANSAS MUNICIPAL INS. TRUST	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the November 15, 2010 Award in both docketed claims by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on February 9, 2011.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for the claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant injured his knee at work on March 28, 2008 (Docket No. 1,042,109). It was further undisputed claimant suffered a fall at work on June 25, 2009 (Docket No. 1,047,248) which resulted in an injury to his back. The cases were consolidated for hearing and awards. The nature and extent of disability in both claims was disputed and respondent argued the second accident was a natural and probable consequence of the first accident. Respondent argued that for compensation purposes

there was only one injury because the second accident was caused by claimant's right knee injury suffered in the first accident and consequently, the second accident was a natural and probable consequence of the first accident instead of a separate compensable accident.

The Administrative Law Judge (ALJ) found claimant's second accident was not a natural and probable consequence of claimant's first accident. Accordingly, the ALJ awarded claimant compensation for a 10 percent permanent partial scheduled disability to the right lower extremity in Docket No. 1,042,109. The ALJ further awarded claimant compensation for a permanent total disability in Docket No. 1,047,248.

Respondent requests review of the nature and extent of claimant's disability in both claims. Respondent argues the evidence is uncontroverted that as a result of claimant's right knee injury on March 28, 2008, his right knee buckled causing the June 25, 2009 fall. Thus, the second injury was a natural and probable consequence of the first injury. But respondent further argues that because the first injury was a scheduled injury any compensation for the second incident would be limited to only medical compensation. Stated another way, respondent argues that because the first injury was to a scheduled member the language of K.S.A. 44-510d limits disability compensation to the scheduled injury and there cannot be additional disability compensation paid for the secondary injury. Respondent further argues compensation should be limited to an award for a scheduled disability to claimant's right lower extremity.

Claimant requests review of the nature and extent of disability in Docket No. 1,042,109. Claimant argues his medical expert's testimony is more persuasive and he should be compensated for a 20 percent scheduled disability to the right lower extremity. Claimant further argues that respondent stipulated to a work-related accident in Docket No. 1,047,248 and cannot now dispute whether he suffered two separate accidents. Claimant requests the Board to affirm the ALJ's finding that the second incident was a separate discrete trauma and as a result he is permanently and totally disabled.

The issue for Board determination in Docket No. 1,042,109 is the nature and extent of disability, specifically whether the second accident and resulting injury is compensable under this docketed claim as a natural consequence of the first accidental injury. The issue for Board determination in Docket No. 1,047,248 is whether claimant suffered a new and distinct accidental injury arising out of his employment and, if so, the nature and extent of disability or whether the accidental injury in this docketed claim was a natural consequence of the first accidental injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Mr. Isabell was employed as a certified license wastewater treatment plant operator and department head. Claimant primarily performed physical manual labor in treating water for waste in Horton, Kansas. On March 28, 2008, claimant injured his right knee at work. He described his injury as follows:

> I was trying to unload a pump because it was bad weather and I didn't want it to sit out in the weather and I was trying to load it by myself, I didn't have any help. It fell over and had a big top turbine and kind of pushed me back and when I caught the top of it, it smashed my leg and injured my leg and my leg popped.[1]

An MRI was performed which revealed tearing of the medial meniscus and an osteochondral defect of the medial femoral condyle. Dr. Galen Seymour referred claimant to Dr. Michael Montgomery. The doctor performed arthroscopic surgery on claimant's right leg on May 28, 2008. The surgery consisted of a partial medial meniscectomy and debridement of the medial femoral condyle of the right knee. Claimant testified that after the surgery his knee would lock up or give out and he would fall. He returned to work for awhile but continued to experience pain and difficulties with his knee.

Respondent referred claimant to Dr. Thomas Samuelson in Overland Park, Kansas. Additional conservative treatment failed to provide relief and Dr. Samuelson performed a second surgery on claimant's right knee on April 16, 2009. This surgery consisted of an arthroscopic partial medial and lateral meniscectomy. The doctor also treated claimant's left knee with Cortisone injections and steroids. Claimant testified that after the second surgery his pain diminished but his leg continued to give out on him. On August 5, 2009, claimant was released from Dr. Samuelson's care with permanent restrictions. Claimant was not to lift anything greater than 25 pounds as well as no bending, stooping or squatting. Claimant had returned to light-duty work for respondent.

But on June 25, 2009, before Dr. Samuelson had released claimant from treatment, the claimant suffered an incident at work. Claimant described it in the following manner:

> Okay. I report to City Hall and clock in and my truck is in the basement for the wastewater treatment plant. And I was walking down the stairs to get my truck to go to work when my leg give out and I fell down the stairs.[2]

On cross-examination, claimant testified that he was in the City Hall building going down stairs when his right knee gave out and he fell. And he further testified that the stairs were not slick or wet nor was he carrying anything. Claimant further testified:

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[1] R.H. Trans. at 13.

[2] R.H. Trans. at 20.

Q. I think you mentioned that your knee locks up quite often since you originally injured it back in March of 2008, correct?

A. Yes.

Q. Prior to March of 2008 when you injured your knee, had you ever experienced that knee locking up like that?

A. No.

Q. Had you ever had any problem with that knee?

A. Not really.[3]

Claimant was on light-duty work when the second accident occurred on June 25, 2009. After falling down 15 steps, he injured his lower back and had pain down the right side of his leg to the thigh area. Claimant was transported by ambulance to the Horton Hospital. He saw Dr. Seymour who ordered x-rays. The doctor then referred claimant to Dr. Joseph Galate in Overland Park, Kansas.

Dr. Galate referred claimant for an MRI which indicated mild central spinal stenosis and generalized disc bulge. Conservative treatment was provided and the doctor also prescribed Morphine and Tramadol for claimant's back pain. Finally claimant was referred to rehabilitation for a functional capacity evaluation. Claimant was off work for approximately 12 weeks. On November 9, 2009, claimant was released from Dr. Galate's care. The doctor placed permanent restrictions on claimant of no lifting greater than 30 pounds.

While working light duty with the office clerk, claimant testified that he was not able to sit for long periods of time. He had to take 20-30 minute breaks. Claimant was terminated on December 7, 2009, due to his inability to fulfill the job requirements for which he was hired. Claimant was not able to find employment after his termination so he applied for unemployment benefits. He received unemployment benefits until his Social Security benefits started in July 2010.

Dr. Edward Prostic, board certified orthopedic surgeon, had first examined and evaluated claimant on November 11, 2008, at claimant's attorney's request. The doctor reviewed claimant's medical records and also took a history from him. Upon physical examination, Dr. Prostic found significant tenderness of the medial joint line as well as crepitus during active range of motion. X-rays of the right knee were taken which revealed small spurs at the intercondylar notch and mild lateral facet overhang at the patella. The doctor also examined claimant's left knee due to his complaints of favoring the right knee.

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[3] R.H. Trans. at 32-33.

Dr. Prostic diagnosed claimant with tearing at the posterior horn of medial meniscus and aggravation of chondromalacia which was caused by the traumatic injury on March 28, 2008. An MRI was recommended to see if there was a recurrent tear of the medial meniscus. The claimant was then provided further treatment for his right knee with Dr. Samuelson.

On April 2, 2010, claimant was seen again by Dr. Prostic. Upon physical examination, Dr. Prostic found claimant's right knee in normal alignment with no intra-articular fusion or thigh atrophy. There was crepitus with range of motion. An x-ray of the right knee showed a neutral alignment with medial joint space narrowing, lateral facet overhang of the patella. The doctor opined that the joint space narrowing had occurred since the first study. Dr. Prostic diagnosed claimant as having sustained tears of the medial and lateral menisci with aggravation to the chondromalacia as well as symptoms of osteoarthritis. The doctor opined claimant's accidental injury on March 28, 2008, caused the torn menisci. Dr. Prostic opined claimant's future medical treatment would include anti-inflammatory and analgesic medicines, probable injections of steroids or hyaluronic acid and eventually surgery for a total knee replacement. Based on the AMA *Guides*[4], Dr. Prostic rated claimant's right knee at 20 percent.

Dr. Prostic was provided a history that claimant sustained another accidental injury on June 25, 2009, when he was descending stairs at work and his knee gave away. When Dr. Prostic performed the physical examination of claimant he found tenderness at the lumbosacral junction as well as reduced hip flexion and internal rotation with pain predominantly externally rotating in the flexed position. Low back x-rays revealed short pericles at the lower lumbar levels, degenerative changes in the low back, and, lateral facet overhang of the patella. Dr. Prostic testified:

> Q. The degenerative changes, were they caused by this accident?
>
> A. Probably not.
>
> Q. Is there any relationship to the complaints he made and the degenerative changes you note?
>
> A. Well, the degenerative changes make it easier for him to injure his low back.
>
> Q. In other words, is a traumatic incident such as he sustained falling down a flight of stairs, when you superimpose that upon a back that already has a degenerative condition that's asymptomatic, is that likely or possible to aggravate that condition and make it painful?

[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

A. Yes.

Q. Do you think that's what happened in this case?

A. Yes.[5]

Dr. Prostic diagnosed claimant with a chronic sprain and strain to his low back due to the accidental injury on June 25, 2009. Based on the AMA *Guides*, Dr. Prostic rated claimant's low back at 15 percent functional impairment to the body as a whole. Claimant's 20 percent left lower extremity converts to an 8 percent whole body impairment. Using the combined value chart, the 8 percent whole body and 15 percent whole body due to his low back result in a 22 percent functional impairment to the body as a whole.

Dr. Prostic also provided claimant permanent restrictions. Claimant was to avoid standing and/or walking more than 30 minutes per hour, avoid more than minimal climbing, squatting or kneeling, avoid lifting greater than 40 pounds occasionally or 20 pounds frequently knee-to-shoulder height and minimal activities below knee height or above shoulder height, avoid frequent bending or twisting at the waist, avoid forceful pushing or pulling and captive positioning.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could no longer perform 21 of the 26 tasks for an 80 percent task loss. The doctor further opined that based upon claimant's history of doing predominantly heavy physical labor and the current condition of his low back and right knee that claimant would be unable to return to similar work. Dr. Prostic concluded that unless trained for other duties claimant is essentially permanently and totally disabled from gainful employment.

Dr. James Zarr, board certified in physical medicine and rehabilitation, examined and evaluated claimant at respondent's attorney's request. The doctor performed a physical examination on August 23, 2010. Claimant was not able to perform a deep knee bend due to pain. He also had tenderness to palpation in the right lower lumbosacral parspinal muscles. Dr. Zarr diagnosed claimant with persistent right knee and low back pain as well as status post right knee arthroscopy with medial and lateral meniscectomies. As of August 23, 2010, claimant was at maximum medical improvement and permanent work restrictions had been established by Drs. Samuelson and Galate.

Based on the AMA *Guides*, Dr. Zarr rated claimant right lower extremity at the level of the knee for his partial medial and lateral meniscectomies at a 10 percent impairment. Due to claimant's low back, the doctor placed claimant in the DRE Category II for a 5 percent whole body impairment.

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[5] Prostic Depo. at 18.

Dr. Zarr reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could no longer perform 22 of the 26 tasks for an 85 percent task loss. But the doctor opined claimant is capable of performing substantial and gainful employment. A second deposition was taken of Dr. Zarr and he then reviewed Mr. Dreiling's task list and concluded claimant could no longer perform 13 of the 26 tasks if the only restriction for the claimant's back was a 30-pound lifting restriction. And again Dr. Zarr stated claimant was able to engage in substantial gainful employment. On cross-examination Dr. Zarr agreed that his opinion was limited to a determination that claimant could perform substantial gainful employment based upon the physical restrictions he had imposed. Dr. Zarr further agreed the determination of the claimant's ability to engage in substantial gainful employment also required consideration of claimant's level of education, training and experience and the doctor would defer to a vocational consultant to put all those factors together.

At the request of claimant's attorney, Mr. Michael Dreiling interviewed claimant to determine the work tasks claimant performed in the 15 years before his accidental injury. Michael Dreiling, a vocational rehabilitation counselor, conducted a personal interview with claimant on March 17, 2010, at the request of claimant's attorney. He prepared a task list of 26 nonduplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, the claimant was not working but had qualified for Social Security disability benefits which began in December 2009. Mr. Dreiling opined claimant was incapable of performing work in the open labor market.

On cross-examination, Mr. Dreiling testified that based solely on the 25-30 lifting restriction of Drs. Galate and Samuelson, claimant would be capable of light-duty work in the open labor market. He further testified that claimant would be able to work in private security.

Claimant continues to have pain in his right leg all the time. Due to him favoring his right leg, he indicated that he's having pain in the left leg.

Initially, claimant notes that in Docket No. 1,047,248 respondent stipulated claimant suffered an accidental injury arising out of and in the course of his employment on June 25, 2009. Consequently, claimant argues that stipulation precludes respondent's argument that the fall was a natural and probable consequence of the first accident. Stated another way, claimant argues respondent admitted the June 25, 2009 accident arose out of claimant's employment and as a result it could not be the natural and probable consequence of the first accident on March 28, 2008, in Docket No. 1,042,109.

As previously noted, these cases were consolidated for hearing. And at the regular hearing as well as in it's submission brief, the respondent stipulated claimant suffered accidental injury arising out of and in the course of his employment on June 25, 2009. But at regular hearing the respondent clarified its position in the following manner:

> JUDGE SANDERS: All right. Anything else?
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> MR. BREWER: Your Honor, I guess there's an issue here. The nature and extent of disability, I think, is the primary issue. There is a question, we consolidated both of these cases, as to whether this was one injury for compensation purposes or two separate injuries because the initial injury was to the knee and my understanding is the second injury, depending on how the facts are determined, could have been the result of or a probable consequence of the first injury and, therefore, we would consider it to be all one injury and compensated all as one injury and not a scheduled injury and a general bodily disability, so I think that's an issue the Court is going to have to determine. And so I think that's probably the reason we consolidated both of these claims together so they could be tried together to address that issue. Is that correct, Mr. Martin?
>
> MR. MARTIN: Yeah, I have no objection.[6]

In stipulating to the second accident on June 25, 2009, it would have been more appropriate for respondent to admit the second accident occurred in the course of employment but deny it arose out of the employment as it was a natural and probable consequence of the first accident. Nonetheless, the respondent's position regarding the second accident was clearly stated at the start of the regular hearing and the issue was preserved with no prejudice to claimant as both parties were aware of the issue. Moreover, it was clear that whether the second accident was a natural and probable consequence of the first injury was an issue in the consolidated claims as the ALJ, in her Award, decided that issue.

Initially, respondent argues that the fall down the stairs at work was a natural and probable consequence of the initial injury claimant suffered to his right knee. There is no dispute that claimant injured his right knee in a work-related incident on March 28, 2008. He had undergone a second surgery to his knee and had not been released from medical treatment. Claimant was on light-duty work when his right knee buckled causing him to fall down stairs.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[7] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

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[6] R.H. Trans. at 10-11.

[7] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[8] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[9] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[10] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[11]

In *Logsdon*,[12] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.

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[8] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[9] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[10] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[11] *Id.* at 728.

[12] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[13] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

In this case claimant admitted that after his second knee surgery his right knee continued to give out on him and cause him a lot of problems.[14] Claimant further testified that his right knee gave out on him which caused him to fall down the stairs. At the time the second accident occurred, claimant was still receiving treatment for his right knee injury. And Dr. Prostic opined that the second accident and fall was caused when claimant's right knee gave way which was due to the pathology in claimant's knee after the first accident.[15] The Board finds under the rationale of *Jackson* and *Logsdon* that claimant's fall down the stairs on June 25, 2009 was a natural and probable consequence of the accidental injury claimant suffered on March 28, 2008.

The Workers Compensation Act requires that functional impairment ratings be determined using the AMA *Guides* (4th ed.) when the *Guides* addresses the impairment in question.[16] Drs. Prostic and Zarr provided ratings pursuant to the AMA *Guides* for claimant's right lower extremity and his back. Dr. Prostic rated claimant with a 20 percent functional impairment to the right lower extremity as a result of his March 28, 2008 accident. Dr. Zarr rated claimant with a 10 percent functional impairment to the right lower extremity. The Board finds that neither opinion was more persuasive and, as such, will average the opinions. Accordingly, the Board finds claimant suffered a 15 percent permanent partial functional impairment to the right lower extremity. Dr. Prostic rated claimant with a 15 percent functional impairment to the back based upon a compromise between the DRE and Range of Motion Models of the Guides. But Dr. Prostic agreed that if only the DRE Lumbosacral model was used, claimant would be rated at 5 percent. Dr.

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[13] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[14] R.H. Trans. at 17.

[15] Prostic Depo. at 25-26.

[16] See K.S.A. 44-510d(a)(23) and K.S.A. 44-510e(a).

Zarr rated claimant with a 5 percent functional impairment to the back based upon DRE Lumbosacral category II. In this case, the Board finds the DRE method and Dr. Zarr's opinion more persuasive and finds claimant suffered a 5 percent permanent partial impairment to his back.

Respondent next argues that because the claimant initially just injured his right knee in the March 28, 2008 accident that his compensation is limited to a scheduled disability. The Board disagrees. As a result of claimant's right knee buckling he fell down the stairs and now suffers a whole person impairment to his back. And in the determination of whether the claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available.[17] In *Bryant*[18], the Kansas Supreme Court stated the general rule:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Simply stated, the Kansas Supreme Court has held that if the injury is both to a scheduled member and to a nonscheduled portion of the body, the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.[19] Because claimant's back injury was a natural and probable consequence of the first accidental injury to his right knee, the Board finds claimant is entitled to compensation for a whole body disability for his back injury attributable to his accidental injury in Docket No. 1,042,109 that occurred on March 28, 2008. Conversely, claimant has failed to meet his burden of proof that he suffered a new and distinct accidental injury arising out of his employment on June 25, 2009, that is compensable in Docket No. 1,047,248.

It must be noted that because claimant's compensation for the 15 percent scheduled injury to his right knee paid out before the injury to his back, the award will compensate the right knee as a scheduled injury. This is analogous to a situation where initial compensation is paid and then after review and modification the compensation is recalculated.

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[17] *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

[18] *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

[19] See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

Claimant argues that as a result of his back injury he is permanently and totally disabled. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[20]

In *Wardlow*[21], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The ALJ analyzed the evidence in the following fashion:

> Mr. Dreiling, the vocational expert opined that due to Claimant's age, his work history and education and training and medical condition Claimant is unable to engage in substantial and gainful employment. That opinion is not challenged and is supported by the Claimant's own opinion as to his current ability to become gainfully re-employed. It is found and concluded that based on the Claimant's physical condition, age, work history and training Claimant is unable to engage in substantial gainful employment. Claimant is permanently and totally disabled.[22]

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[20] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[21] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[22] ALJ Award (Nov. 15, 2010) at 10.

Dr. Prostic opined that based upon claimant's history of performing heavy manual labor and based upon the current condition of his low back and right knee that claimant would be unable to return to similar work and unless trained for other job duties claimant is essentially permanently and totally disabled from gainful employment. When Mr. Dreiling, the vocational expert interviewed claimant he noted claimant was not working but had qualified for Social Security disability benefits and Mr. Dreiling opined claimant was incapable of performing work in the open labor market.

Conversely, Dr. Zarr stated claimant was able to engage in substantial gainful employment. But Dr. Zarr agreed that his opinion was limited to a determination that claimant could perform substantial gainful employment based upon the physical restrictions he had imposed which were limited to a weight lifting restriction. Dr. Zarr further agreed the determination of the claimant's ability to engage in substantial gainful employment also required consideration of claimant's level of education, training and experience and the doctor would defer to a vocational consultant to put all those factors together.

Based upon a review of the entire evidentiary record, the Board finds that claimant's physical restrictions must include both those for his right knee as well as his back. And when those restrictions are combined the vocational expert as well as Dr. Prostic opined that claimant is essentially and realistically unable to engage is substantial gainful employment. The Board finds claimant has met his burden of proof to establish that he is permanently and totally disabled.

AWARD IN DOCKET NO. 1,047,248

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated November 15, 2010, is modified to reflect claimant failed to meet his burden of proof that he suffered accidental injury arising out of his employment.

AWARD IN DOCKET NO. 1,042,109

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated November 15, 2010, is modified to reflect claimant suffered a 15 percent impairment to his right lower extremity and a permanent total disability.

Claimant is entitled to 11.86 weeks of temporary total disability compensation at the rate of $322.72 per week in the amount of $3,827.46 followed by 28.22 weeks of permanent partial disability compensation, at the rate of $322.72 per week, in the amount of $9,107.16 for a 15 percent loss of use of the right leg; followed by 12.31 weeks temporary total disability compensation at the rate of $322.72 per week or $3,972.68 followed by permanent total disability compensation at the rate of $322.72 per week not to exceed $125,000 for a permanent total general body disability beginning June 25, 2009.

As of March 18, 2011, there would be due and owing to the claimant 11.86 weeks of temporary total disability compensation at the rate of $322.72 per week in the amount of $3,827.46 followed by 28.22 weeks of permanent partial disability compensation, at the rate of $322.72 per week, in the amount of $9,107.16 for a 15 percent loss of use of the right leg; plus 12.31 weeks of temporary total disability compensation at the rate of $322.72 per week in the sum of $3,972.68 plus 14.69 weeks of permanent total disability compensation at the rate of $322.72 per week in the sum of $4,740.76 plus 63.14 weeks of permanent total disability compensation at the rate of $388.61 per week in the sum of $24,536.84 for a total due and owing of $46,184.90, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $78,815.10 shall be paid at $388.61 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge